



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/748,287	12/31/2003	Jane Frances Heschmeyer	08116.0023.NPUS00	9611

7590 06/08/2010  
Steven J. Moore  
Kelley Drye & Warren LLP  
Intellectual Property Department  
400 Atlantic Street, 13th Floor  
Stamford, CT 06901-3229

EXAMINER
----------

STULII, VERA

ART UNIT	PAPER NUMBER
----------	--------------

1781

MAIL DATE	DELIVERY MODE
-----------	---------------

06/08/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/748,287	<b>Applicant(s)</b> HESCHMEYER ET AL.	
	<b>Examiner</b> VERA STULII	<b>Art Unit</b> 1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 02 March 2010.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1,5,14 and 15 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,5,14 and 15 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 5, 14 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Western Communion Hosts in view of Salza (US 8,836,680) essentially for the same reasons as stated in the Non-Final Office action mailed 06/10/2009.

### ***Response to Arguments***

Applicant's arguments filed 09/09/2009 have been fully considered but they are not persuasive.

On page 10 of the Reply to the Non-Final Office action mailed 06/10/2009, Applicants summarize the rejection of claims 1, 5, 14 and 15 under 35 U.S.C. 103(a) as being unpatentable over Western Communion Hosts in view of Salza (US 8,836,680).

On page 11 of the Reply, Applicants state that “[c]laim 1 claims a method of preparing low gluten wafers derived solely of wheat without corruption from additives or other agents such as emulsifiers that are used as substitutes for gluten”. In response to this argument, it is noted that pending claims 1, 5, 14 and 15 recite the wafer, and not the method/process of producing the wafer. In regard to process limitations in these claims, it is noted that instant claims the product, not the process. “[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not

Art Unit: 1781

depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.” *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) (see MPEP 2113). ). Therefore, the method steps included in the product claims would not impart any patentable distinction.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In response to Applicants' arguments on pages 12 and 13 of the Reply, it is noted that Salza is not relied upon as a teaching of emulsifiers used in past products. Salza is relied upon as a teaching of substituting wheat flour as a traditional pasta ingredient with a mixture of ungelatinized and pre-gelatinized wheat starch in order to produce gluten-free product suitable for individuals suffering from gluten intolerance. Western Communion Hosts reference is relied upon as a teaching of preparation of communion altar bread using traditional ingredients such as wheat flour and water; and as a teaching of recognition of a problem of serving such bread to the gluten intolerant individuals by providing with alternative recipes containing alternative ingredients.

Western Communion Hosts discloses preparation of communion altar bread using traditional ingredients such as wheat flour and water, recognizes a problem of serving such bread to the gluten intolerant individuals and provides with alternative recipes containing alternative ingredients. However, these recipes are not applicable to

Art Unit: 1781

the Communion breads, because of the use of wheat ingredients only requirement.

Salza offers a solution to this problem. Salza discloses preparation of gluten-free pasta product by substituting traditional pasta ingredients with a mixture of ungelatinized and pre- gelatinized wheat starch. One of ordinary skill in the art would have been motivated to modify Western Communion Hosts in view of Salza and to substitute wheat flour mixture with ungelatinized and pre- gelatinized wheat starch mixture as taught by Salza. One of ordinary skill in the art would have been motivated to do so in order to produce a communion bread product suitable for individuals suffering from gluten intolerance. One of ordinary skill would have been motivated to do so, since both references disclose a need for the gluten-free product. One of ordinary skill in the art would have been motivated to do so, since substitution of wheat flour in Western Communion Hosts with ungelatinized and pre- gelatinized wheat starch of Salza would result in a product made solely of water and wheat ingredients that would satisfy strict communion bread requirement. In regard to the "wafer" recitation, it is noted that a host, as a portion of bread for Holy Communion is often served as a thin wafer. In regard to the amounts of starches and water, Salza discloses that the proportions of water to starch depend on the consistency of the final product (Col. 2 lines 11-14). Salza discloses 52-64 parts of water for 100 parts by weight of starch (Col. 1 lines 18-20). It is further noted, that Salza discloses dried product that further requires re-hydration for subsequent consumption. Therefore, one of ordinary skill in the art would have been motivated to increase amount of water used in order to produce a product that will not require further re-hydration and is ready for the immediate consumption. In regard to forming a homogeneous mixture of

Art Unit: 1781

warm water, pregelatinized and non-gelatinized starch, Salza discloses forming a homogeneous mixture of water, pregelatinized and non-gelatinized starch (Col. 3 claim 1). Salza is silent as to the proportion of pregelatinized starch to the non-gelatinized starch (Col. 2 lines 60-67). One of ordinary skill in the art would have been motivated to vary proportion of pregelatinized starch to the non-gelatinized starch in order to produce product having the same or similar characteristics to the gluten-containing counterpart.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to VERA STULI whose telephone number is (571)272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1781

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Vera Stulii/  
Examiner, Art Unit 1781

/Keith D. Hendricks/  
Supervisory Patent Examiner, Art Unit 1781